No. 18667

In the United States Court of Appeals for the Ninth Circuit

ELINOR E. PETERSEN, CAROL E. HECHE, 51.424 ACRES OF LAND IN THE CITY AND COUNTY OF SAN FRANCISCO, ETC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From The United States District Court For The Northern District of California, Southern Division

MEMORANDUM FOR THE UNITED STATES

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INTEREST OF THE UNITED STATES

The appellants herein are seeking to establish themselves as the owners of lands, title to which was acquired by the United States by virtue of its having filed a declaration of taking in condemnation on February 27, 1956. This is basically a controversy between the appellants and the State of California, which also claimed title to the subject lands, over

the distribution to be made of compensation which the United States must pay for the property which it has taken.

The right of the United States to take the subject land is not challenged. Ordinarily, the United States has no interest in title disputes and takes no position concerning them. In this instance, however, the appellants are claiming title to the subject lands by virtue of a United States patent. The interpretation of this patent is of concern to the United States, as the title to considerable property would be affected if the appellants' claim of title were upheld. In addition, appellants have now advanced an argument based upon actions of the United States after condemnation in which it has a direct interest.

For this reason, we are filing this memorandum outlining the United States' position concerning the effect of its patent, which was issued pursuant to Section 13 of the Act of March 3, 1851, 9 Stat. 631.

STATEMENT

The lands in question are in the area acquired as a result of the Mexican War by the Treaty of Guadalupe Hidalgo, February 2, 1848, 9 Stat. 922, which guaranteed the property rights of Mexicans in the annexed territory. Under the treaty provisions and the general law of nations, the land titles of individuals within the ceded territory were protected. However, the number of claimants and the type of Spanish and Mexican grants were many and varied. Land owned by the Mexican government and lands

as to which no valid private claim could be established belonged to the United States. These facts required some procedure for ascertaining the validity and the boundaries of the private claims in order to set apart the lands privately owned from those which belonged to the United States. To accomplish this, Congress passed the Act of March 3, 1851, 9 Stat. 631, entitled "An act to ascertain and settle the private land claims in the State of California." This Act established a Board of Land Commissioners with authority, upon petition of those claiming under Mexican or Spanish grants of land in the annexed territory, to pass upon the validity of the grants. Right to a review of the Board's determination by the district court and the Supreme Court of the United States was allowed the claimants and the Government.

The United States, in 1874, issued the patent here involved to Antonio Peralta, through which the appellants claim title. Prior to the issuance of this patent, the claim of Antonio Peralta had been presented to the commissioners appointed to ascertain and settle private land claims in the State of California. This commission considered the evidence produced and found that the claim to the place called San Antonio was valid to the whole extent of its bounds. This determination was appealed to the United States District Court for the Northern District of California. From the decree of the district court, the United States appealed to the Supreme Court of the United States, which affirmed the de-

cison of the lower court. *United States* v. *Peralta et al.*, 19 How. 343, 349 (1856).

When these condemnation proceedings were instituted, the lands in question were submerged, underlying San Francisco Bay. The appellants' position in the district court was that the Spanish grant to Don Luis Peralta placed the western boundary of the Rancho San Antonio as the sea and that, under the Spanish law, this runs to the deepest part of the sea. The district court ruled that the appellants' title had been presented to commissioners pursuant to the Act of March 3, 1851, and confirmed by the District Court for the Northern District of California, and that no title to land in California depending on Spanish or Mexican grants could be of any validity unless submitted to and confirmed by the Board, citing *Botiller* v. *Dominguez*, 130 U.S. 238 (1888). The court further held that a United States patent is the final act in proceedings instituted for the confirmation of a claim and that it is a record which, while it stands, binds both the Government and the claimant and cannot be attacked by either party except by direct proceedings instituted for that purpose.

The court concluded that the United States' patent which was issued to Antonio Peralta is the only evidence of the extent of the grant and that the boundary is clearly drawn in the patent at the ordinary high water mark. The court also held that the land in issue lies beyond the ordinary high water mark and had become vested in the State of California.

ARGUMENT

The appellants here specify a great number of matters as errors (Br. 28-38). Primarily, these are argumentative statements which have no bearing on the issue before this Court. The appellants argue that the lands to which they are claiming title are now located above the line of ordinary high tide of the Bay of San Francisco (Br. 35(h)), and that the only land excluded from the United States' patent under which they claim title is that land which is covered by the tides (Br. 36). The appellants maintain that their rights began when the lands became filled and above the ordinary high water mark (Br. 12).

The appellants ask this Court to rule, among other things, that the appellants are "* * * the owners in fee of all of the filled lands, formerly tide lands on the Island of Alameda, that are above the line of ordinary high tide of the Bay of San Francisco * * *," that "* * * the State of California is subject to the prior Spanish Land Grant of 1820 of the Rancho San Antonio to Don Luis Peralta and has no vested interest by virtue of its sovereignty in the tide lands within the Rancho San Antonio and on the Island of Alameda * * *," and that "* * * the State of California * * * has no vested interest, * * * in the filled lands within the Rancho San Antonio * * * above the line of ordinary high tide of the Bay of San Francisco, * * *" (Br. 54-55).

I

THE FACT THAT AFTER THE TAKING THE UNITED STATES FILLED SUBMERGED LANDS IS IRRELEVANT TO THE PRESENT ISSUE

As we have just noted, appellants' arguments to this are in very large measure based on the claim that after the taking the United States filled the submerged lands for its purposes and that now the disputed area is fast land. That fact is plainly irrelevant here. Upon filing of the declaration of taking, title vested in the United States, and the Declaration of Taking Act provides that at that time "the right to just compensation for the same shall vest in the persons entitled thereto; * * *." Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. sec. 258a. Subsequent developments have no bearing on determining who is entitled to compensation. *United States* v. *Dow*, 357 U.S. 17 (1958).[1] This is the answer to appellants' present contention. However, we shall now show the reason the district court was correct in its ruling.

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[1] Mere artificial fill does not change title. *City of Newport Beach* v. *Fager*, 39 Cal.App.2d 23, 102 P.2d 438, 442 (1940); *City of Los Angeles* v. *Anderson*, 206 Cal. 662, 275 Pac. 789, 791 (1929); see also *United States* v. *Turner*, 175 F.2d 644, 647 (C.A. 5, 1949), cert. den., 338 U.S. 851; and *Barney* v. *Keokuk*, 94 U.S. 324 (1877), where an upland owner obtained no title to land which was filled by a city.

II

APPELLANTS DID NOT OWN THE LANDS IN QUESTION AT THE DATE OF TAKING

A. *The patent issued by the United States is the only evidence which can be considered in determining the extent of the appellants' claim of title.*—"* * * there can be no doubt of the proposition, that no title to land in California, dependent upon Spanish or Mexican grants can be of any validity which has not been submitted to and confirmed by the board provided for that purpose in the act of 1851; or, if rejected by that board, confirmed by the District or Supreme Court of the United States." *Botiller* v. *Dominguez*, 130 U.S. 238, 255-256 (1889).

By the Act of March 3, 1851, 9 Stat. 631, the United States has declared the conditions under which it would discharge its political obligations to Mexican and Spanish grantees. It is required in Section 13 of this Act that all private land claims be presented within two years from its date and it is declared, in effect, that if, upon such presentation, they are found by the tribunal created for their consideration and by the courts on appeal to be valid, it will recognize and confirm them, and take such action as will result in rendering them perfect titles. But it has also declared by the same Act that, if the claims are not presented within the period prescribed, it will not recognize or confirm them and the claimed land will be considered as a part of the public domain.

In *Beard* v. *Federy*, 3 Wall. 478, 492 (1865), the court stated that "By the act of March 3d, 1851, they [the United States] have declared the manner and the terms on which they will discharge this obligation. * * * When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant."

The descriptions of the land which are contained in the original Spanish Land Grant and the succeeding proceedings relating to the validity of the claim are of no effect in this condemnation proceeding as the patent alone governs what land the United States recognized as a valid claim. *Dominguez De Guyer* v. *Banning*, 167 U.S. 723 (1897), stated at page 740 that "* * * a patent issued avowedly in execution of such decree [under the Act of 1851] was conclusive between the United States and the claimants, and, until cancelled, it alone determines * * * the location of lands that passed under the decree."

B. *The patent issued by the United States gave no rights to the appellants to lands below the ordinary high water mark.*—The court below found that "The patent clearly draws the line at *ordinary high water mark*, and it will not be presumed that the government intended to convey beyond the ordinary high water mark" (Order Dismissing Claims of Elinor E. Petersen and Carol E. Heche, p. 7 of Appendix of Appellee, State of California).

"It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention. [Citations omitted.]" *Shively* v. *Bowlby*, 152 U.S. 1, 13 (1894). See also *Los Angeles* v. *San Pedro*, 182 Cal. 652, 189 Pac. 449 (1920), cert. den., 254 U.S. 636. The Supreme Court in *United States* v. *Pacheco*, 2 Wall. 587, 590 (1864), affirming a decree of the district court conferring a claim to land under a Mexican grant in California along the Bay of San Francisco, stated that "When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails. [Footnote omitted.]" See also *United States* v. *Stewart*, 121 F. 2d 705 (C.A. 9, 1941).

C. *Title to tidelands not previously patented by the United States inured to the State of California on its admission to the Union.*—In *Knight* v. *U. S. Land Association*, 142 U.S. 161, 183 (1891), the Supreme Court held that "Upon the acquisition of the territory from Mexico the United States acquired the title to the tide lands equally with the title to the upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territorty."

Upon the admission of California as a state in the Union, it acquired a qualified title to lands within its boundaries under navigable waters, such as rivers,

harbors and tidelands, which had not previously been validly conveyed. *United States* v. *California*, 332 U.S. 19, 30 (1947). In *Weber* v. *Harbor Commissioners*, 18 Wall. 57, 65-66 (1873), the Court stated that "Although the title to the soil under the tidewaters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part * * *."

CONCLUSION

The patent granted by the United States to the appellants' predecessors in interest clearly draws the boundary line of the Rancho San Antonio at the ordinary high water mark. The lands within the Bay of San Francisco lying below this line not having been previously conveyed belonged to the State of California prior to the filing of the declaration of taking by the United States. The court below properly dismissed the claims of the appellants to any land lying below this line.

The judgment below should be affirmed.

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